UNITED ASIAN BANK BERHAD

v.

A. SUBRAMANIAM (AS THE PERSONAL REPRESENTATIVE OF ROSHAMMAH A/P SAMUAL (DECEASED)) & 4 ORS.

HIGH COURT MALAYA, SHAH ALAM
DATO' MAHADEV SHANKAR J.
[ORIGINATING SUMMONS NO. 24-116-90]
30 MARCH 1994

LAND LAW: Deceased stood as guarantor for borrower (first defendant) - Borrower declared a bankrupt on the application of the Inland Revenue - Plaintiff obtaining judgment against estate of deceased - Plaintiff applying for order for sale of deceased's property - Order for sale granted and auction date fixed - Application by second, third, fourth and fifth defendants to intervene in proceedings - Intervenors applying to be added as defendants - Application to set aside order for sale - Whether there were any merits in the application.

The deceased was the registered owner of a piece of land (the said land). The deceased's husband (the borrower) sought credit facilities from the plaintiff in return for which the deceased executed a Lien holder's caveat and deposited the title to the said land with the plaintiff. The deceased also executed a personal guarantee.

The borrower was made a bankrupt on the application of the Department of Inland Revenue. Subsequent to his bankruptcy, the borrower continued to increase his indebtedness to the plaintiff by drawing on his account. On being informed of the borrower's bankruptcy, the plaintiff froze his account and filed an action in the Sessions Court against the estate of the deceased, wherein the borrower was formally appointed to represent the estate, and obtained judgment. The plaintiff applied for an order for sale which was granted and an auction date was fixed.

Two days before the sale was to take place, the intervenors, the children of the borrower, filed an application for the sale to be stayed pending the disposal of their application to be substituted or added as defendants. The intervenors claimed, *inter alia*, that before the Lien holder's caveat was registered they were part owners of the said land by virtue of a payment of RM25,000 to the deceased, that the order for sale was unlawful because the borrower was bankrupt and had no *locus standi*, that all proceedings in the matter should have been served on the official assignee and that the plaintiff had not made full disclosure of the shares which had been pledged by the borrower as additional security for the credit facilities.

The Court granted the stay and the intervenors were added as defendants. The question before the Court was whether, in the light of the issues raised by the defendants, their application to set aside the order for sale should be allowed.

Held:

[1] The defendant's contention that the judgment obtained by the plaintiff against the deceased's estate was defective because it directed the borrower as personal representative of the deceased's estate to pay the plaintiff the amount adjudged, was without merit. Executors and Administrators are collectively described as personal representatives of deceased's estates, and the first defendant was named as such in the title to these proceedings.

[2] Order 8 rule 14 RHC 1980 indicates that proceedings may be initiated, as was done in this case, against a deceased's estate in the absence of a person representing the estate, and a person appointed in the proceedings, as was done here, to represent the estate. The judgment made it clear that it was to be enforced against the assets of the deceased's estate.

[3] The borrower knowingly and without informing the plaintiff of his bankruptcy continued to operate his bank account and increase his indebtedness. The plaintiff acted in good faith and without notice. Since the plaintiff is a secured creditor and the judgment debt of the deceased's estate to the bank is not provable in the bankruptcy, s. 8 of the Bankruptcy Act (the Act) does not preclude the plaintiff from effecting recovery against the deceased's estate. In the circumstances, the defendants argument that the plaintiff could not claim for repayment of a principal sum in excess of that owed on the date of the bankruptcy by reason of s. 43 of the Act, failed.

[4] A secured creditor who does not prove in the bankruptcy, cannot be deprived of the interest which the law and his contract allows him and it follows that the defendants reliance on s. 43(6) of the Act to the effect that the plaintiff

should only be entitled to interest at 6% per annum was misconceived. As for the additional securities held by the plaintiff, it is well established law that a banker has a right to sue a guarantor without resorting to the securities deposited by the borrower.

[5] There was not a shred of evidence to support the bare assertion by the defendants that they had advanced money to the deceased for the purchase of the said land and house, nor did they take any steps to protect their equity. The deceased was registered as the owner of the said land and the plaintiff were *bona fide* purchasers of their interest for value and without notice. In the circumstances, the second, third, fourth and fifth defendants claim to an interest in the said land had to be rejected.

[6] Intervention to be legitimate must qualify with the conditions prescribed by O. 15 r. 6(2)(b)(i)or(ii) RHC 1980. It may be permitted at any stage of the proceedings and a person can only be regarded as a proper party if his presence before the Court is imperative for the adjudication.

[7] The only party who had such an interest in this case was the estate of Roshammah a/p Samuel, (deceased) and the borrower was regularly appointed as the representative of the estate. The purported intervention by the other defendants was an unwarranted intrusion and their attempts to reopen issues which had been settled in the bankruptcy proceedings and in the judgment which led to the final order for sale defies the rules relating to both procedure and substance.

[Defendants application dismissed with costs to be taxed on a Solicitor and Client basis].

Cases referred to:
Chinese Tin Mines Rehabilitation Loans Board v. Official Assignee F. J. [1957] 23 ML J 65 ***(refd)***
Perwira Habib Bank Malaysia Bhd v. Wastecol Manufacturing Sdn. Bhd. & Ors. [1988] 3 ML J 215 ***(refd)***
Arab Malaysia Finance Bhd. v. Ampang Granite Sdn. Bhd. [1994] 1 AMR 11 ***(refd)***
Mui Bank Bhd. v. Cheam Kim Yu (Beh Sai Ming, Intervenor) [1992] 2 ML J 642 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 27, 31(a), 43(6), 114
National Land Code 1965, s. 281(2)
Rules of the High Court 1980, O. 15 r. 6(b)(i) or (ii)
Subordinate Courts Rules 1980, O. 8 r. 14

Other sources referred to:
Paget, **Law of Banking,** 10th Edn. [1989], pp. 606 & 607
The Modern Contract of Guarantee [1992], Phillips & Donovan, p. 460

For the plaintiff - K. Maniam; M/s. K.L. Rekhraj & Co.
For the defendant - Shanmugam; M/s. Alex & Partners

JUDGMENT

Mahadev Shankar J:
This case is about a borrower and his family who did everything they could to frustrate a bank from selling their home to pay off a judgment debt.

Roshammah a/p Samuel (the deceased) was the registered owner of the land held under state lease 1446 Lot No. 297 in P.J. (the said land). On it is a house No. 33 Jalan 1/2 Petaling Jaya (the said house). The deceased's husband A. Subramaniam a.k.a. A.S. Maniam (the Borrower) is a contractor. Their two daughters and two sons (the Intervenors) live in the said house.

In 1982 the borrower approached the Bank for credit facilities. The Bank wanted security. So the deceased executed a Lien holder's caveat and deposited the title to the said land with the plaintiff (the Bank). The deceased also executed a personal guarantee.

Thereupon the borrower was given overdraft facilities on his current account with the bank which he fully utilised. The borrower bought shares and deposited three lots with the bank as additional security to allow him to continue the overdraft.

The borrower did not pay his taxes. The Department of Inland Revenue took out a bankruptcy notice and served it on the borrower. This was followed by a creditor's petition. On 5 March 1984 the borrower was made a bankrupt.

It is a criminal offence for a bankrupt to obtain credit without the permission of the official assignee. The borrower did not tell the bank he had been made a bankrupt. On the date of his bankruptcy he owed the bank RM7,794.54. Immediately thereafter he increased his indebtedness by drawing on the overdraft day by day till it became RM21,812.72 by the end of the month. He continued to operate this account until the 27 August 1984 when the balance stood at RM23,958.61. On that date the bank were notified by the official assignee of the bankruptcy.

The bank immediately froze the account and ruled it off.

What should have happened next was for the bank to realise its security or give it up and prove in the bankruptcy. Unfortunately the deceased who was ill with cancer died on 13 November 1986. The family did not apply for letters of administration. Eventually in 1989 the bank filed an action in the Sessions Court where the borrower was formally appointed to represent the estate of the deceased. On 11 January 1990 the bank obtained judgment for RM50,324.31 being the amount due at the date of the institution of the action and with interest thereafter and costs. The order specifically provided that it was to be levied against the real and personal estate of the deceased.

The bank then filed this originating summons under s. 281(2) of the National Land Code 1965 for an order of sale. The borrower was named as the defendant in his capacity as the personal representative of the estate. He was served but did not enter appearance. The notice of appointment to hear this originating summons was also served upon him.

At the first hearing he appeared with the official assignee and the matter was adjourned. At the second hearing he again appeared with the official assignee. This was on 31 January 1991. The official assigneed disclaimed any interest in the said land as it had nothing to do with the personal bankruptcy of the borrower. The Court accordingly made an order in terms of the application for the recovery of the amount due to the bank with continuing interest and costs. The auction was fixed for 6 May 1991. This order was not appealed against. It was duly perfected and extracted on 20 February 1991.

The summons for directions was then taken out and served on the defendant and the order made on 19 March 1991. The bank produced a valuation report and the licensed auctioneer issued the proclamation. All was set for the sale to go on.

At all times material to these proceedings the borrower and the intervenors were living in the said house. They were well aware of what was going on.

Two days before the sale was to take place these intervenors filed a summons-in-chambers asking for the sale to be stayed pending the disposal of their application to be substituted or added as defendants and for such other relief as may be just. The affidavit-in-support filed by all four of them claimed that before the Lien holder's caveat was registered they were part owners of the said land by virtue of a payment of RM25,000 to the deceased, that the order of sale was unlawful because the borrower was bankrupt and had no *locus standi,* that all proceedings in this matter should have been served on the official assignee, that this originating summons had not been served in the time prescribed therefore and that the bank had not made full disclosure of the shares which had been pledged by the borrower as additional security.

With considerable regret I granted the stay subject to terms that a sum of RM2,500 be deposited in Court as security for the costs and expenses of the aborted auction. This was done on 17 May 1991. The intervenors were added as defendants. Thereafter further affidavits were filed by the borrower the intervenors and the bank.

Counsel for the intervenors raised the following issues.

Firstly it was contended that the judgment obtained by the bank against the deceased's estate was defective because it directed the borrower as personal representative of the deceased estate to pay the bank the amount adjudged. It was submitted that the defect was in wrongly describing him as "personal representative" when he should have correctly been described as "representative." I reject this submission out of hand. Executors and administrators are collectively described as personal representatives of deceased's estates, and the defendant was named as such in the title to these proceedings. The Subordinate Courts Rules 1980, O. 8 r. 14 reads as follows:

> 14.(1) Where in any proceedings it appears to the Court that a deceased person was interested in the matter in question in the proceedings and that he has no personal representative, the Court in the absence of a person representing the estate of the deceased person may by order appoint a person to represent that estate for the purposes of the proceedings; and any such order, and any judgment or order subsequently given or made in the proceedings, shall bind the estate of the deceased person to the same extent as it would have been bound had a personal representative of that person been a party to the proceedings.

> 14.(2) Before making an order under this rule, the Court may require notice of the application for the order to be given to such (if any) other persons having an interest in the estate as it thinks fit.

The rule indicates that proceedings may be initiated, as was done in this case, against a deceased's estate in the absence of a person representing the estate, and a person appointed in the proceedings, as was done here, to represent the estate. The judgment made it clear that it was to be enforced against the assets of the deceased's estate.

Earlier the borrower had tried to get out of the representation order by claiming he was a bankrupt at the time. But s. 31(a) of the Bankruptcy Act specifically empowers a Court to allow a bankrupt to manage the business of his spouse.

The second contention was that as the deceased died intestate her property had passed to the borrower. Since he was already a bankrupt it was said that the said land had vested in the official assignee and therefore the bank could not obtain an order for sale! This argument is unworthy of any attention. The deceased had encumbered the said land in her lifetime and the property could only pass subject to the encumbrance.

The third point was that the bank could not claim for repayment of a principal sum in excess of that owed on the date of his bankruptcy, (i.e. RM7,794.54) by reason of s. 43 of the Bankruptcy Act. This borrower knowingly and without informing the bank of his bankruptcy continued to operate his bank account, and increased his indebtedness to the limit of his overdraft, until the bank froze the account immediately it was informed by the official assignee of the adjudication and receiving orders. That this happened only on 28 August 1984 also suggests that the borrower did not promptly disclose his affairs to the official assignee as he was bound to do so in law. These are acts punishable under the Bankruptcy Act 1967 (see ss. 27 and 114 of this Act). The bank acted in good faith and without notice. Since the bank is a secured creditor and the judgment debt of the deceased's estate to the bank is not provable in the bankruptcy, I do not think s. 8 of the Act precludes the bank from effecting recovery against the deceased's estate (as opposed to the borrower's debt to the bank as to which I make no finding here). As for the interest accruing due from the date of the bankruptcy it was submitted that by virtue of s. 43(6) of the Act, the interest should be only 6% per annum. Again Counsel for the intervenors has blinded himself to s. 43(6) which refers to debts "proved upon a debtor's estate." The bank's claim here is not against the bankrupt borrower. A secured creditor who does not prove in the bankruptcy, cannot be deprived of the interest which the law and his contract allows him: See *Chinese Tin Mines Rehabilitation Loans Board v. Official Assignee FJ* [1957] 23 MLJ 65.

The fourth issue raised by the intervenors was that the bank held additional securities by way of the three lots of shares deposited by the borrower in October 1983 and that by only selling them in 1991 the bank had caused the borrower unnecessary loss. On the facts this is a highly speculative submission because there is no evidence whatsoever as to when it is being alleged the shares should have been sold. As a matter of law however it is well established that a banker has a right to sue a guarantor without resorting to the securities deposited by the borrower: See Paget : **Law of Banking** 10th Edn. [1989] at pp. 606 & 607 and **The Modern Contract of Guarantee** 1992] by Phillips & Donovan at p. 460 where the case of *Ewart v. Latta* is discussed. See also *Perwira Habib Bank Malaysia Bhd v. Wastecol Manufacturing Sdn Bhd & Ors.* [1988] 3 MLJ 215. See also *Arab Malaysia Finance Bhd v. Ampang Granite Sdn Bhd* [1994] 1 AMR 11 p. 585 where Y.A. Siti Norma held that a bank can elect when it wishes to dispose its securities.

The last issue raised was a claim that in 1982 the intervenors "advanced" RM20,000 to the deceased (their mother) for the purchase of the said land and house, that the deceased promised to transfer the property to them and therefore the house was theirs. This nebulous claim has all the marks of another afterthought. Apart from the bare assertion there is not a shred of evidence to support it, nor did the intervenors take any steps to protect their equity if by some remote chance they could be believed on this issue. In their affidavit the claim was only to half the property. It is not irrelevant that the borrower makes no mention of the alleged transfer anywhere in these proceedings. The deceased was registered as the entire owner of this

land. The bank were *bona fide* purchasers of their interest for value and without notice. I therefore reject this submission also.

The order for sale which the intervenors are now seeking to set aside is a final order unless appealed against. Once it was made, drawn up and perfected this Court is *functus officio* and has no power to set it aside. It was so held by the Supreme Court in *Mui Bank Bhd v. Cheam Kim Yu (Beh Sai Ming, Intervenor)* [1992] 2 MLJ 642. In that case the public auction was completed. Thereafter the registered owner purported to sell the land to the intervenor. To that extent the facts can be distinguished because in our case the intervenors sought to come in two days before the sale actually took place. Should they have been permitted to do this? I hope enough has been said to demonstrate the conclusion that this purported intervention should never have seen the door of this Court.

Intervention to be legitimate must qualify with the conditions prescribed by O. 15 r. 6 2(b) (i) or (ii) of the Rules of the High Court 1980. It may be permitted at any stage of the proceedings. This means it must be applied for before the final order is made, not after it has been perfected and extracted. Secondly a person can only be regarded as a proper party if his presence before the Court is imperative for the adjudication. In a general sense what this means is that the intervener must have a direct legal or financial interest in the action. The only party who had such an interest in this case was the estate of Roshammah a/p Samuel deceased, and nobody else. The borrower was regularly appointed as the representative of the estate. In so far as the bankruptcy of the borrower was concerned, as between himself and his creditor, he alone had such an interest. The receiving and adjudication orders were *res judicata.*

How the intervenors and their advisors took it upon themselves to try and reopen issues which had been settled in the bankruptcy proceedings and in the judgment which led to the final order of sale being made defies the rules relating to both procedure and substance. This purported intervention was an unwarranted intrusion for which the intervenors must pay the price. I now dismiss their application. I order each of the intervenors to be jointly and severally liable for the costs of the bank. I further order that the costs be taxed on a solicitor and client basis because I do not think the defendants and their advisors could have believed that they had an arguable case. I also order that the sale of the subject property be held on 25 July 1994 and that the first defendant and the intervenors and any other persons who are in the said house do vacate the same on a date to be nominated by the bank to whom I give liberty to apply for any further direction required to complete the sale by public auction. Finally I order that the sum of RM2,500 deposited by the intervenors be paid out to the bank towards satisfaction *pro tanto* of their taxed costs, and the balance, if any, be refunded to them.